October 10, 2005

Financial Accounting Standards Board
401 Merritt 7
P.O. Box 5116
Norwalk, Connecticut 06856-5116

Re: File Reference 1225-001 - Proposed Statement of Financial Accounting Standards,
“Accounting for Transfers of Financial Assets, an amendment of FASB Statement No. 140” (the “Proposed Amendment”)

Ladies and Gentlemen:

The Commercial Mortgage Securities Association (“CMSA”) notes, and appreciates, that the Proposed Amendment addresses many of the comments CMSA and others provided on the related 2003 Exposure Draft. CMSA’s comments on the specific provisions of the Proposed Amendment (by Proposed Amendment paragraph) follow.

Typical CMBS Transactions:

Most CMBS issued in the United States are designed so:
1. The transfers of commercial mortgage loans to the CMBS issuing special purpose entity qualify to be accounted for as Statement 140 sales by the related transferors and
2. Both the transferors and all CMBS investors are exempt from FIN 46(R)’s consolidation provisions with regard to the CMBS issuing special purpose entity.

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1 CMSA is an international trade organization dedicated to improving the liquidity of commercial mortgage backed securities (“CMBS”) through access to the capital markets. Headquartered in New York City, CMSA has chapters in Canada, Europe, and Japan, and has expanded to more than 300 member firms since it was founded in 1994. CMSA’s members include leading CMBS originators, issuers, investors and service providers, including the largest money-center banks, investment banks, insurance companies, money managers, specialty finance companies, loan servicers and rating agencies. Additional information on CMSA can be found at www.cmbs.org.

2 There frequently are several transferors in one CMBS transaction.
This is usually accomplished by:

1. “Two step transfers,” in which the transferors transfer loans to a single bankruptcy remote special purpose entity (usually referred to as the “Depositor”) that is owned by one of the transferors, enabling:
   - All of the transferors to obtain a “true sale” opinion with regard to their transfers to the Depositor and
   - The Depositor’s owner to obtain a “substantive non-consolidation” opinion with regard to the Depositor and

2. Designing the second step special purpose entity that is the issuer of the CMBS to be a Statement 140 qualifying SPE.

Exposure Draft Comments:

Transfers of Partial Interests -
(proposed paragraphs 2(g), 8A, and 9)

Senior interests in large commercial mortgage loans are sometimes included in CMBS transactions. These senior interests may be created by separating large commercial mortgage loans into senior and subordinated participations. The senior participation is usually transferred to the CMBS issuing qualifying SPE, while the subordinated participation is transferred to a non-qualifying SPE purchaser or retained by the related originator/transferor.

The senior/subordinated participations are created after the related commercial mortgage loan has been originated because the size of the senior participation transferred to the CMBS issuing qualifying SPE is generally not known when the large commercial mortgage loan is originated, as it is determined when the related CMBS are created and rated by the Rating Agencies. These participations would not qualify as “Participating Interests” under the Proposed Amendment due to their senior/subordinated structure.

While loan agreements for large commercial mortgage loans typically allow lenders to amend the loan documents to exchange the original commercial mortgage loan for one or more separate commercial mortgage loans with the desired senior/subordinate provisions, it is more practical and much administratively simpler in many cases to create subordination using participations, as it avoids the need to have the borrower formally amend their loan agreement.

The Proposed Amendment will not allow transferors to account for transfers of senior participations in large commercial mortgage loans as Statement 140 sales because the participation will not be a “Participating Interest.”

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3 The other transferors usually do not obtain a substantive non-consolidation opinion with regard to the Depositor, as the legal concept of substantive non-consolidation typically does not apply to non-affiliates of the Depositor.

4 If they are not qualifying SPEs, most CMBS issuing special purpose entities would be FIN 46 (R) “Variable Interest Entities.”
As a result, transferors of large commercial mortgage loans desiring Statement 140 sales treatment will be required to either:

1. Require large loans borrowers to enter into separate senior and subordinate loans, or
2. Transfer the entire large loan to an entity (i.e., an entity not currently included in most CMBS structures, and which would have to be a qualifying SPE) that would create and issue senior and subordinate beneficial interests to the CMBS issuing qualifying SPE and the subordinated interest holder, respectively.

While the approach described in the preceding paragraph could be used, CMSA does not believe it adds any substantive benefit to CMBS structures, adds an unnecessary level of complexity, administration and expense to CMBS transactions, and does not, in any way, effect the transferors' ability to legally isolate the senior participations or to relinquish effective control of the transferred senior participation or the large commercial mortgage loan. Accordingly, CMSA requests that Statement 140 sales treatment be allowed for transfers of transferor created senior/subordinated participations that are not "Participating Interests" without creating a qualifying SPE.

If, despite CMSA's recommendation, the Proposed Amendment is not changed as CMSA recommends, CMSA requests confirmation in the Final Amendment of CMSA's conclusion that transfers of senior participations that are not "Participating Interests" to a CMBS issuing special purpose entity that otherwise meets all qualifying SPE requirements, will have no impact on:

1. The CMBS issuing special purpose entity's QSPE status as a result of the transferor accounting for that portion of the transfer as a secured borrowing, or
2. The ability of the transferors of other whole loans to the CMBS issuing special purpose entity to account for those transfers as Statement 140 sales, assuming the transfers meet all applicable Statement 140 sale criteria.

The conclusion in the prior paragraph (which CMSA requests confirmation of in the Final Amendment) is based on CMSA's reading FASB Staff Interpretation No. 50 of Statement 140, which provides that if:

1. A transferor/servicer who has the right to repurchase all of the transferred financial assets (presumably from a qualifying SPE) when their aggregate principal balance is 30% of the balance at the time of transfer, and
2. That right is not a Statement 140 "clean up call" should account for the transfer as a 70% Statement 140 sale and a 30% Statement 140 borrowing.

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5 Assuming the Proposed Amendment is not changed, the transferor would be required to account for its transfer of that senior participation as a secured borrowing from the CMBS issuing special purpose entity.
6 This illustration assumes all commercial mortgage loans are transferred to the qualifying SPE by one transferor.
7 I.E., the call can be exercised before the costs of servicing are "burdensome" in relation to the benefits of servicing.
Legal Isolation-
(proposed paragraphs 9(a), 9(d), 9(e), 27, 27A, 27B, 28, 83(c), and A17)

True Sale:
The Proposed Amendment requires that for a Statement 140 transfer to be accounted for as a sale, the transfer must be a legal sale and the transferor must be able to obtain (but not necessarily do) “True Sale” and “Substantive Non-Consolidation” opinions. This appears to be a change from Statement 140’s current provisions and practices, by which it is only necessary that the transferred assets be “legally isolated” from, and be “beyond the reach of,” the transferor and its creditors.

For certain transfers by FDIC regulated banks or by non-United States domiciled transferors, it may be possible to “legally isolate” transferred assets without a transfer that is legally a sale or without obtaining True Sale and Substantive Non-Consolidation opinions. Furthermore, it is possible that future changes in United States laws and/or new court cases may necessitate obtaining different legal opinions to substantiate “legal isolation.”

CMSA sees no reason why a legal standard that may apply only to certain United States based transferors should be applied to transferors to whom it does not apply and is not applicable. Accordingly, CMSA requests that the Final Amendment’s retain only the current Statement 140 “legal isolation” requirement, and not include detailed rules on the precise legal opinions or standards necessary to achieve “legal isolation.”

Substantive Non-Consolidation:
The Proposed Amendment requires a non-consolidation opinion for Statement 140 sales when the transferee is an “affiliate, qualifying SPE, or other SPE.” The current auditing literature (i.e., AU 9336), which is endorsed by the Proposed Amendment, only requires substantive non-consolidation opinions for United States transferors when the transferee is an affiliate of the transferor.

CMSA believes, as a legal matter, that the concept of substantive non-consolidation only applies to transferees that are affiliates of the transferor. Further, the concept of substantive non-consolidation may not apply in countries outside the United States. Accordingly, CMSA recommends that the Proposed Amendment be conformed with AU 9336, so non-consolidation opinions are only required for United States based transferors when the transferee is an “affiliate.”

CMSA also suggests that the Proposed Amendment be clarified to indicate that, in the context of paragraph 9(a) and substantive non-consolidation opinions for United States based transferors, “affiliate” is used in its legal (as opposed to an accounting) context.
Legal Opinions on “Hypothetical Transactions”:

The Proposed Amendment requires, as a condition for accounting for a transfer as a Statement 140 sale, in certain circumstances, that transferors obtain “true sale” and “substantive non-consolidation” opinions based on certain assumed (i.e., “hypothetical”) transaction provisions.

Proposed Amendment paragraph A17 (not part of the Proposed Standard itself) indicates the legal opinions must hypothetically assume any involvement by all consolidated affiliates (including bankruptcy remote SPEs) of the transferor with the ultimate transferee or the transferee’s beneficial interest holders (if the transferee is a qualifying SPE) was provided directly by the transferor. This is inconsistent with Proposed Amendment paragraph 9(e) (part of the actual Proposed Standard), which only requires that transferor affiliate arrangements with a qualifying SPE’s beneficial interest holders be assumed to have been entered into directly by the transferor. CMSA sees no reason for a transferor to be required to address substantive consolidation by transferor affiliates who have absolutely no involvement with the transfer or the transaction.

Further, CMSA believes that the guidance in paragraphs A17 and 9(e) of the Proposed Amendment must be changed to exclude the involvement of bankruptcy remote SPEs that are transferor affiliates. Hypothetically assuming such bankruptcy remote SPE’s involvement was provided by the transferor would, in most cases, preclude attorneys from issuing true sale and substantive non-consolidation opinions -- this is the reason two step transfers using a bankruptcy remote special purpose entity are used in most securitizations. CMSA assumes the reference to bankruptcy remote entities in these paragraphs was a drafting error, and urges the Board to change the language accordingly. Leaving the language as written in the Proposed Amendment would mean that a substantial portion of all United States based securitizations (not just CMBS transactions) now accounted for as Statement 140 sales would be accounted for as secured borrowings.

CMSA does not agree with the requirement to obtain the “Hypothetical Opinions” on the basis that it ignores the legal principal by which, under certain circumstances, the separate existence of affiliated entities is respected. Accordingly, CMSA requests that this provision be deleted from the Final Amendment.

Further, the Proposed Amendment appears to require non-consolidation opinions covering all transferor affiliates, even those that have absolutely no involvement with the transaction. If the requirement to obtain Hypothetical Opinions is retained, CMSA recommends that such non-consolidation opinions not be required with regard to affiliates who are not involved at all in the transaction, as a means to eliminate unnecessary time and expense in addressing these matters.

While CMSA suggests that the Hypothetical Opinions provision be removed from the Final Amendment, if the Board decides not to do so, CMSA is concerned that there will be practical problems in obtaining such Hypothetical Opinions, as preparers, auditors, and attorneys may not be able to agree on the precise hypothetical changes that must be addressed in the opinions. That is, there may be practical problems in determining how far to go (or when to stop) in considering hypothetical changes.
CMSA is concerned that attorneys may be reluctant, as a procedural matter, to issue legal opinions on Hypothetical Transaction structures. Accordingly, if the need for “hypothetical opinions” is retained in the Final Amendment, CMSA suggests that the Board conduct discussions with attorneys and accountants to evaluate the practicality of obtaining Hypothetical Opinions that satisfy preparers’ and auditors’ requirements under the Proposed Amendment. If it is determined to be practical to obtain Hypothetical Opinions, CMSA recommends that the Final Amendment provide practical guidance on their content.

**Proposed Paragraph 9(b):**

*Ability to Sell or Pledge the Transferor’s Beneficial Interest:*

The Proposed Amendment requires that for a Statement 140 sale to an ultimate transferee that is a qualifying SPE, all qualifying SPE beneficial interest holders (including the transferee) must be able to pledge or sell their qualifying SPE beneficial interests if the SPE is to be a qualifying SPE. In some transactions, there are valid legal, tax, regulatory, and/or other reasons why the transferor and/or a bankruptcy remote affiliate of the transferor must be constrained from selling or pledging its qualifying SPE beneficial interests at all, or, in other cases, constrained from selling to certain types of buyers (who may already be buyers).

CMSA requests that this provision be removed from the Final Amendment. CMSA sees no reason why a constraint on the transferor’s ability to sell or pledge its beneficial interest in a qualifying SPE requires that the entire transfer be accounted for as a borrowing and possibly cause the SPE not to be a qualifying SPE for all parties to whom such a determination is relevant.

**Multiple Step Transfers to SPEs:**

The Proposed Amendment provides that in transactions that utilize multiple steps and multiple SPEs, each SPE is to be considered a “transferee” and that to achieve a Statement 140 sale all transferees must be able to sell or pledge the transferred assets.

CMSA does not believe the Board intended this to apply to typical two step CMBS in which the transferred commercial mortgage loans are first transferred to a bankruptcy remote SPE (the Depositor referred to above), who then immediately transfers those financial assets to the CMBS issuing qualifying SPE.

Accordingly, CMSA recommends that the Proposed Amendment be clarified to indicate that these types of constraints (i.e., the Depositor can only, and must, transfer its financial assets to the qualifying SPE) do not preclude a Statement 140 sales treatment. As indicated above, such two-step structures are usually necessary to achieve legal isolation.

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8 CMSA is not clear if this would be the case. The Final Amendment should clearly indicate if this is the case.
Proposed Paragraph 40(c)-

Derivatives – Timing of Evaluation:

Consistent with Proposed FASB Staff Position No. 140-e, “Clarification of the Application of Paragraphs 40(b) and 40(c) of FASB Statement 140” (the “Proposed FSP”), CMSA believes the Board intends the provisions of paragraph 40(c) of Statement 140 (derivatives must fully, but not excessively counteract risk) to be evaluated only at the time the qualifying SPE is established and financial assets are transferred to it. This is not clear as the language in Statement 140, which is carried over into the Amendment, is different for paragraph 40(c) (relates to derivative notionals; uses the term “initial” and “is expected to”) and 40(c) (does not use either of those terms).

CMSA suggests that paragraph 40(c) of Statement 140 (this aspect is not changed by the Proposed Amendment) be modified accordingly.

Bifurcated Derivatives:

Proposed Statement of Financial Accounting Standards, “Accounting for Certain Hybrid Financial Instruments, an amendment of FASB Statements No. 133 and 140” (the “Proposed Statement 133 Amendment”) requires that certain derivatives be bifurcated from qualifying SPE beneficial interests. Statement 140 provides (this provision is carried over in the Proposed Amendment) that a qualifying SPE can only own passive derivatives that meet certain specified conditions.

CMSA assumes (but is not sure) this provision relates only to qualifying SPE beneficial interests owned by parties other than another qualifying SPE and not if they are owned by another qualifying SPE. That is, while CMSA understands a qualifying SPE cannot own assets that are derivatives in their entirety, CMSA believes a QSPE can own compound instruments that are required to be bifurcated into a host contract and a derivative under the Proposed Statement 133 Amendment. CMSA requests that the Board clarify these provisions accordingly. If CMSA has not interpreted the Board’s intent properly, CMSA would like the opportunity to comment accordingly, as CMSA does not believe bifurcated derivatives should be relevant to qualifying SPE status.

Proposed Paragraph 41-

The Proposed Amendment provides that a qualifying SPE can only hold equity instruments temporarily if the qualifying SPE obtains them as result of the qualifying SPE’s collection efforts related to the transferred financial assets owned by the qualifying SPE.

CMSA requests that the Proposed Amendment be changed so it is clear that a qualifying SPE can hold an equity interest in an SPE the qualifying SPE establishes to temporarily hold non-financial assets the qualifying SPE obtains upon foreclosing on the commercial real estate or other assets that secures a defaulted loan owned by the qualifying SPE. Such SPEs are frequently used in CMBS transactions so that CMBS issuing qualifying SPEs can legally isolate any exposure (for example environmental exposure) related to a foreclosed property from effecting any other of the CMBS qualifying SPE’s assets.
Further, CMSA requests that the Proposed Amendment be clarified so it is clear that a qualifying SPE (e.g., a CDO that holds CMBS and is structured as a qualifying SPE) can own beneficial interests issued by another qualifying SPE, even if those interests are equity in legal form and are required to be accounted for as equity interests under Statement 115.

**Proposed Paragraph 45A(c)-**

CMSA believes the prohibition of “synergy” in a qualifying SPE that can roll over its beneficial interests should only apply to the party who obtains that benefit and that the entity should still be considered a qualifying SPE by all other parties involved with the SPE.

CMSA makes this recommendation based on practicality, as CMSA believes it will be difficult, if not impossible, for third parties to determine if another party has more than trivial benefits as a result of having two or more rights of the type described in the Proposed Amendment.

**Effective Date - Proposed Appendix C-**

For public companies, certain of the Proposed Amendment’s measurement provisions with regard to the calculation of the gain on sale would be effective for transfers that take place after the start of the first fiscal year in the quarter in which the Proposed Amendment is issued in final form. These provisions relate primarily to the computation of gain or loss from a transfer that qualifies as a Statement 140 sale, and generally do not impact whether the transfer qualifies to be accounted for as a Statement 140 sale.

CMSA does not believe it is practical for any portion of the Proposed Amendment to be required to be applied to transactions completed prior the issuance of the Final Amendment. Accordingly, CMSA requests that the Final Amendment be changed so the changes are not required to be applied before the beginning of the first fiscal quarter beginning after the quarter in which the Final Amendment is issued.

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CMSA would be pleased to discuss its comments and this letter with the Board or with the FASB Staff at their convenience. If CMSA can be of further assistance, please contact Stacy Stathopoulos at (212) 509-1950.

Very truly yours,

Dottie Cunningham
Chief Executive Officer
Commercial Mortgage Securities Association